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Utah Court of Appeals

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Mark Shurtleff; Utah Attorney General; Counsel for Appellee.

Margaret P. Lindsay; Aldrich, Nelson, Weight & Esplin; Counsel for Appellant.

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff/Appellee,

vs.

RICKY BILLSIE,

Defendant/Appellant.

Case No. 20030066-CA

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**REPLY BRIEF OF APPELLANT**

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APPEAL FROM FOURTH JUDICIAL COURT, UTAH COUNTY, STATE OF  
UTAH, FROM A CONVICTION OF THREE COUNTS OF AGGRAVATED  
SEXUAL ABUSE, FIRST DEGREE FELONIES, BEFORE THE HONORABLE  
JAMES L. SHUMATE

---

**MARK SHURTLEFF**

Utah Attorney General

**APPEALS DIVISION**

160 East 300 South, Sixth Floor

P.O. Box 140854

Salt Lake City, Utah 84114

Counsel for Appellee

**MARGARET P. LINDSAY (6766)**

Aldrich, Nelson, Weight & Esplin

43 East 200 North

P.O. Box "L"

Provo Utah, 84603-0200

Telephone: (801) 373-4912

Counsel for Appellant

**FILED**  
Utah Court of Appeals

**JAN 16 2004**

Paulette Stagg  
Clerk of the Court

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**IN THE UTAH COURT OF APPEALS**

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**ARGUMENT**

**I. THE TRIAL COURT CREATED AN INHERENTLY PREJUDICIAL SITUATION BY PLACING A SCREENING BARRIER IN FRONT OF BILLSIE DURING G.B.'S TESTIMONY, WHICH VIOLATED BILLSIE'S RIGHT TO CONFRONT HIS ACCUSER AND HIS RIGHT TO A FAIR TRIAL.**

The State first claims that Billsie failed to preserve his constitutional challenge to the trial court placing a screening barrier in front of him thereby violating his right to confront his accuser and his right to a fair trial (Br. of App. at 12). The record shows that a large portion of the conversation between the parties and the trial court in relation to the placement of the screening barrier was not preserved in the record (R. 155: 84, 92-95).

A close reading of the record, however, further shows that Billsie did in fact object to the placement of the screening barrier and repeatedly requested a hearing on the matter in order to determine if such a barrier was necessary (R. 155: 84, 92-95). Although the record omits the conference regarding the placement of the screening barrier, the trial court later disclosed in the record that it previously ordered a screening barrier placed

between G.B. and Billsie (R. 155: 95). Unfortunately, the record does not contain Billsie's objections at the time the screening barrier was set up (R. 155: 84, 92-95). However, only a few minutes after the screening barrier was set up, Billsie's defense counsel again objected to this situation, referencing Billsie's right to confrontation and the necessity of the screening barrier, and made the statement, "Again, we have to have a hearing on it, your honor, I think." (R. 155: 94). The statement "again" shows that Billsie previously requested a hearing regarding the necessity of the screening barrier.<sup>1</sup>

The State next claims that the trial court did not plainly err by erecting a screening barrier that blocked the "direct line of sight between defendant and the victim," or at least this error was not "obvious" to the trial court (Br. of App. at 16). The State further claims that "Under the unique circumstances of this case, the requisite showing of

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<sup>1</sup> The State also erroneously claims that after the recess, G.B. again denied the rape allegations and then the trial court ordered the screening barrier to be erected (Br. of App. at 13, n7). That claim is incorrect. Directly after the recess, G.B. was not asked whether Billsie raped her and she did not deny that Billsie raped her (R. 155: 91-92). Instead, the prosecutor asked G.B. whether Billsie had touched her under her clothes with his hand or some other body part (R. 155: 91). The prosecutor then attempted to ask G.B. about a pretrial conversation "about Rick putting his private in your private" and Billsie immediately objected (R. 155: 92). Following this objection, the trial court explained on the record that it had previously ordered the screening barrier to be erected during the last recess (R. 155: 95).

The State also claims that during the recess, G.B. "'broke down' crying and told her mother and the prosecutor that she felt scared because defendant was staring at her in the courtroom" (Br. of App. at 13). However, at no point did G.B. testify that she was scared of Billsie. Instead, after the screening barrier was in place, the prosecutor specifically asked G.B., "Now, before we took a break, you weren't able to tell us about that (rape allegations).... Can you tell us why it was hard for you to tell us that?" (R. 155: 102). G.B. responded, "Because [Billsie] was looking at me real sad." (R. 155: 102). Moreover, defense counsel argued to the trial court that G.B. did not appear afraid (R. 155: 94).

necessity was properly made without resorting to an evidentiary hearing” (Br. of App. at 18). Billsie asserts that it was plain error to erect a screening barrier violating his constitutional right to face his accuser.

Billsie asserts that the State’s heavy reliance on *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), is misplaced. *Craig* dealt with the necessity of making specific factual findings regarding the use of a one-way closed circuit television procedure where the accusers were questioned outside of the presence of the defendant. 497 U.S. at 842. In *Craig*, the trial court heard expert testimony that the child sexual abuse victims would not be able to testify in the presence of the defendant. *Id.*

Specifically, the experts’ testimony was summarized as the following:

The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what ‘would cause him the most anxiety would be to testify in front of Mrs. Craig....’ The child ‘wouldn't be able to communicate effectively.’ As to another, an expert said she ‘would probably stop talking and she would withdraw and curl up.’ With respect to two others, the testimony was that one would ‘become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions’ while the other would ‘become extremely timid and unwilling to talk.’

*Id.*

The distinction between *Craig* and *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), is that the trial court in *Craig* made “case-specific” findings

based upon expert testimony that a one-way closed circuit television was necessary to protect the welfare of the child witnesses; whereas in *Coy*, the United States Supreme Court rejected the State's assertion that the defendant's confrontation right was outweighed by the necessity of protecting minor victims of sexual abuse and the presumption of trauma, since there were no findings supporting the assertion. *Coy*, 487 U.S. at 1020-21.

In *Craig*, the United States Supreme Court held that the trial court had to "hear evidence and determine whether the use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness...." *Craig*, 497 U.S. at 856. The trial court must also find that the "child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant." *Id.* And finally, "the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimus*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" *Id.* (citations omitted).

In *Coy*, the United States Supreme Court specifically rejected the use of a screening barrier between the defendant and the accusing minor witnesses even though the State argued that it was necessary to protect the minor victims from trauma. *Coy*, 487 U.S. at 1020-21. The Court observed that the trial court made "no individualized findings that these particular witnesses needed special protection" and concluded that the defendant's right to confront his accusers had been violated. *Id.* at 1021.

The State admits that "a generalized concern to protect minor victims does not alone justify limitations on confrontation" and that "a 'case specific finding of necessity'



is required” (Br. of App. at 17, citing *Craig*, 497 U.S. at 852-53, 858 (1990)). However, Billsie asserts that the trial court made no case specific findings which supported the use of a screening barrier in this matter. Instead trial court merely stated:

The court, after having been informed of the concerns of counsel regarding the breakdown of this witness leaving the courtroom, instructed the bailiff to place the large podium on counsel table blocking the line of sight between the witness and Mr. Billsie....

We already have the record of witness’ responses when Mr. Billsie was watching her and she was watching him. We will see if there is any great difference between the setting and what we now have where there is a line of sight blockage between the two.

(R. 155: 95). Thus, the trial court was basically concerned with whether G.B. would change her testimony. The trial court did not discuss G.B.’s alleged breakdown or the need to protect her from severe emotional distress caused by a further confrontation with Billsie. It is evident that the trial court was only concerned with whether G.B.’s testimony would change.

The State claims that Billsie admitted to staring at G.B. during trial (Br. of App. at 16, n.9). Billsie disagrees with this claim. Billsie stated at the sentencing hearing that G.B. was not afraid of him, and that at trial, G.B. attempted to “rush over” and talk to him but others prevented her (R. 157: 7). Billsie also stated that while “sitting in the court,” G.B. was not scared of him but instead, “I look at her, she’s sitting over there and she smiles. And we had eye contact. And we looked at each other. And she smiled.” (R.

157: 7). There is no evidence whatsoever that Billsie was staring at G.B. with malicious intent or with any intent to scare her. Moreover, at sentencing Billsie expressly denied staring at G.B. during trial (R. 157: 7-8).

Additionally, the State further misrepresents the factual record claiming that G.B. feared Billsie because Billsie's "own witness subsequently testified that, even prior to trial, the victim expressed fear of the defendant and the victim verified that she was afraid of seeing defendant in court" (Br. of App. at 19, n.12 (citing R. 156: 194-95, 254)). However, Tillhash testified that G.B. was scared of her own father, Dean Billsie; not Ricky Billsie the defendant and appellant (R.156: 194-95). Furthermore, G.B. only testified that she did not want to see Billsie at court (R. 156: 254). G.B. did not, however, testify why she did not want to see Billsie.

And finally, Billsie contends that the State's assertion that the trial court's error did not deny Billsie a fair trial is erroneous (Br. of App. at 20). The screening barrier impermissibly impressed upon the minds of the jurors near the outset of the trial that Billsie could not be trusted, that he was a danger to G.B., and that he was guilty. This effectively eroded the presumption of innocence and biased the jury against Billsie.

Moreover, there was not a shred of physical evidence to support the allegations against Billsie. Thus, the sole issue before the jury was the credibility of Billsie versus G.B. Billsie asserts that the screening barrier impermissible implied that he was guilty and untrustworthy, thereby making his testimony less credible in the minds of the jury and causing the jury to believe G.B. over Billsie even though there was no supporting

physical evidence of a crime. Accordingly, the trial court denied Billsie his right to a fair trial.

**II. THE TRIAL COURT IGNORED RULE 615 BY NOT EXCLUDING URSULA BILLSIE DURING EXAMINATION OF G.B. AT DEFENSE'S REQUEST, THUS PREJUDICING BILLSIE AND DENYING HIM A FAIR TRIAL**

The State also claims that the trial court properly exercised its discretion to allow G.B.'s mother to remain in the courtroom after Billsie invoked the exclusionary rule pursuant to Rule 615 of the Utah Rules of Evidence (Br. of App. at 21). The claim is without merit.

The State concedes that Rule 615 "mandates exclusion of witnesses if requested" (Br. of App. at 22). The only exceptions are clearly outlined in Rule 615, and G.B.'s mother did not fall into one of those distinguished categories. However, the State claims that Ursula Billsie fit under the Rule 615(1)(c) exception, being "a person whose presence is shown by a party to be essential to the presentation of the party's cause." (Br. of App. at 22, quoting Rule 615(1)(c)). Billsie maintains that the State made no showing that Ursula Billsie's presence was essential to their case nor did the trial court make sufficient findings that she fit within one of the exceptions.

The State appropriately points out that "a witness of tender years may be accompanied by an adult" in court (Br. of App. at 23, citing *State v. Harrison*, 2001 UT 33, ¶7, 24 P.3d 936). However, the language of Rule 615 mandates the trial court "shall order witnesses excluded" "at the request of a party" and only allows a witness to remain

for special, specific reasons. The State cannot cite to any portion of the record where the State argued that Ursula Billsie fit within one of these exceptions. In fact, the State made no claim that she was essential to their case.

And while the State claims “the trial court articulated its reasons for granting the request,” the trial court in fact did not articulate sufficient reasons pursuant to Rule 615 (Br. of App. at 24). Rule 615 is designed to ensure that witnesses are not tainted or influenced by other witnesses at trial. *See Astill v. Clark*, 956 P.2d 1081, 1087 (Utah App. 1988). Billsie’s theory of the case hinged on evidence that Ursula Billsie coerced G.B. into accusing him of the charges (R. 155: 119). However, the trial court failed to consider how this might affect G.B.’s testimony and only considered the fact that G.B. was of “tender years” (R. 155: 120). Thus, Billsie asserts that the trial court’s hasty reasoning for allowing Ursula to remain was insufficient for Rule 615 purposes.

The State further claims “there is no basis from which to conclude that the mother conformed her testimony to that of the child, or that the child changed her testimony based on the mother’s presence” (Br. of App. at 26). However, the opposite is true. Allowing Ursula Billsie to remain in the courtroom improperly influenced G.B. and thereby denied Billsie his right to a fair trial. Although it is impossible to appraise the exact taint or influence Ursula Billsie had on G.B., the record shows that G.B. did in fact change her testimony when the screening barrier was erected in front of Billsie, allowing only a direct line of sight between G.B. and Ursula, and completely blocking the line of sight between G.B. and Billsie (R. 155: 94-95, 96-97).

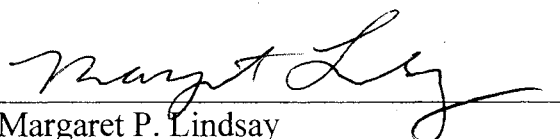
**III. THE TRIAL COURT'S FAILURE TO GRANT A MISTRIAL DUE TO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT PREJUDICED BILLSIE AND THE IMPROPER COMMENTS WERE HARMFUL.**

Billsie relies upon the assertions stated in his original brief.

**CONCLUSION AND PRECISE RELIEF SOUGHT**

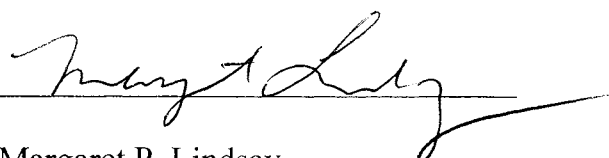
For the foregoing reasons and the reasons stated in the original brief, Billsie asks this Court to reverse his convictions and remand the matter to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of January, 2004.

  
Margaret P. Lindsay  
Counsel for Appellant

**CERTIFICATE OF MAILING**

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 16<sup>th</sup> day of January, 2004.

  
Margaret P. Lindsay  
Counsel for Appellant